NO. 80-732

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE RUCKER COMPANY

Petitioners

VERSUS

SHELL OIL COMPANY, GARDNER-DENVER COMPANY, AND HAROLD LEE ENGINEERING COMPANY

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the decision of the United States Court of Appeals reversing the directed verdict in favor of The Rucker Company, was arbitrary and capricious, and so far departed from normal judicial process as to constitute a denial of due process.

The following parties were involved in this case but did not appeal this decision with reference to petitioners, thus are not pertinent to this appeal;

Ernest J. Ramos, Leon C. Fontenot, Booker Drilling Company, Inc., Liberty Mutual Insurance Company, Hartford Accident and Indemnity Company, Livingston Corporation, Gulf States Fishing and Rental Tools, Inc., Oil Field Rental Service Company, Stewart and Stevenson Services, Inc., and Pittsburgh Testing Laboratories.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO: _____

ERNEST J. RAMOS AND LEON C. FONTENOT

VERSUS

BOOKER DRILLING COMPANY, INC., LIBERTY MUTUAL INSURANCE COMPANY, HAROLD LEE ENGINEERING COMPANY, GARDNER - DENVER COMPANY, SHELL OIL COMPANY, LIVINGSTON CORPORATION, GULF FISHING AND RENTAL TOOLS, INC., OIL FIELD RENTAL SERVICE COMPANY, STEWART AND STEVENSON SERVICES, INC., THE RUCKER COMPANY AND PITTSBURGH TESTING LABORATORIES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Rucker Company, a defendant in the captioned cause respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 11, 1980 (original decision) and on June 30, 1980 (per curiam denial of rehearing).

CITATIONS TO OPINIONS BELOW

The judgment and opinion of the District Court are unreported and are reproduced in the supplement at Appendix 1, Brief page A-1. The opinion of the United States Court of Appeals for the Fifth Circuit dated April 11, 1980, (Circuit Judges Tuttle, Fay and Thomas), is reproduced in the supplement beginning at Appendix 2, Brief page A-2 and is reported in 615 F. 2d 334. The opinion of the United States Court of Appeals for the Fifth Circuit denying rehearing, dated June 30, 1980, is reproduced in the supplement beginning at Appendix 3, Brief page A-24.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit denying rehearing in this cause was entered on June 30, 1980. This petition of certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U. S. C. Section 1254(1), 62 Stat. 928.

STATEMENT OF THE CASE

Plaintiffs, Ernest Ramos and Leon Fontenot instituted proceedings in the United States District Court for the Western District of Louisiana to recover damages for personal injuries allegedly sustained as a result of the collapse of the mast of an offshore oil-drilling rig. Plaintiffs sued:

1) Harold Lee Engineering Company (mast manufacturer)

2) Shell Oil Company (platform owner)

3) Gardner-Denver Company (vendor of the mast)

4) Bethlehem Steel (supplier of some steel in the mast)

5) The Rucker Company (manufacturer of the blow-out preventer)

6) Oil Field Rental Service Company (lessor of the blowout preventer)

7) Tideland Welding Services

8) Schlumberger Offshore Services

By intervention and third party practice, other parties were added:

1) Booker Drilling Company's (the employer workmen's compensation insurer, Liberty Mutual Insurance Company

2) Stewart and Stevenson Services, Inc. (manufacturer of the accumulator system that was used to operate the blowout preventer)

3) Livingston Corporation (formerly Gulf States Fishing and Rental Tools, Inc.)

By other third party pleadings, other parties were joined but were dismissed by summary judgments which have become final and are not material to the case as it presently exists.

By the time the Trial on the Merits took place on July 6, 1977, the only remaining parties to the trial were Shell Oil Company, Gardner-Denver Company, Harold Lee Engineering, The Rucker Company and Stewart and Stevenson Services.

At the conclusion of all of the evidence in the principal demand and all of the evidence gy third party plaintiffs, the trial court, on the basis that there was no evidence on which to establish a cause of action, granted a directed verdict in favor of The Rucker Company and Stewart and Stevenson Services, Inc. The jury, at the conclusion of the trial, found in favor of the remaining defendants because only Booker Drilling Services, the plaintiff's employer and immune from tort liability, was alone guilty of negligence.

Plaintiff perfected an appeal against the other defendants, but dismissed their appeal against The Rucker Company, petitioner herein, recognizing that there was no evidence in the record of any fault against petitioner. However, Shell, Gardner-Denver and Harold Lee perfected a "protective appeal" against petitioner herein. On appeal, the United States Court of Appeal for the Fifth Circuit found that evidence of failures of other masts designed by Harold Lee Engineering had been improperly excluded and reversed and accordingly remanded the jury's verdict for a new trial as to Harold Lee Engineering and Gardner-Denver. The Court sustained the summary judgment granted to Oil Field Rentals. The Court reversed and remanded the jury's verdict with respect to Shell, finding that it could be held liable under a Louisiana Law theory of strict liability. Then without discussion, ordered "other final judgments are REVERSED; and the matter remanded for trial." A Petition for Rehearing was filed on behalf of The Rucker Company on the basis that the facts in the record dictated that the judgment rendered by the District Court in its favor be affirmed, but this petition was denied.

FACTS

The drilling crew, which included the plaintiffs, Messrs. Ramos and Fontenot, was drilling a well for Shell Oil Company on a platform located on the Outer Continental Shelf in the Gulf of Mexico off the Louisiana Coast. As the driller was

pulling the pipe out of the hole, the pipe was blocked, either because the driller was negligent: the rams, manufactured by Rucker, malfunctioned; or the closing unit, manufactured by Stewart and Stevenson, malfunctioned. The jury found in answering Jury Interrogatory Number Five, that the driller was negligent, this caused the blockage of the pipe, and the blocking of the pipe caused the derrick to collapse.

The plaintiffs sued Shell Oil Company as platform owner, Harold Lee Engineering Company as the derrick manufacturer, Gardenr-Denver Company as seller of the derrick, The Rucker Company which manufactured the blowout preventers, Oil Field Rental, which was the lessor of the blowout preventer stack, Bethlehem Steel Manufacturers, which had manufactured some of the steel which was in the mast, Tidelands Welding Services, Inc. and Schlumberger Offshore Services.

The Trial on the Merits began July 6, 1977 and lasted almost two weeks. A total of twenty-eight (28) witnesses, lay-persons and experts, testified on behalf of the palintiffs, third party plaintiffs and intervenors. Not a single one of these witnesses testified that the blowout preventers manufactured by The Rucker Company had malfunctioned. To the contrary, the evidence established that:

a) The blowout preventers worked perfectly before the accident.

b) The blowout preventers were checked immediately after the accident and were found to be in perfect condition.

c) The blowout preventers were checked immediately after the accident and worked perfectly.

d) The blowout preventers were used to complete taking the string out of the hole after the accident

without any incident whatsoever.

e) The blowout preventers then went on to another job for Shell Oil Company and worked perfectly,

f) The blowout preventers were dismantled and checked by all interested parties, including Shell Oil Company and Booker Drilling Company approximately a month after the accident and were found to be in perfect condition.

g) The blowout preventers were subsequently checked by experts on behalf of The Rucker Company and were found to be in perfect condition.

h) The blowout preventers have been used ever since without any incident.

On motion of The Rucker Company and after hearing all the evidence presented by the plaintiffs, defendants, third party plaintiffs and cross-complaintants, the trial judge granted a directed verdict in favor of The Rucker Company. At the close of the trial, the issues with reference to the remaining defendants were submitted to the jury, who returned a verdict in their favor.

Plaintiffs appealed the *jury verdict*, but *did not* appeal the directed verdict in favor of The Rucker Company. The defendants against whom the plaintiffs appealed, appealed against The Rucker Company. At the argument in the Court of Appeals and in the briefs, no mention was ever made of any legal or factual bases of any fault on the part of The Rucker Company or any defect in its product. The United States Court of Appeals for the Fifth Circuit rendered an opinion on April 11, 1980, which ***without discussing The Rucker Company***, "reversed" all final judgments.

The Rucker Company applied for rehearing and in an opinion rendered June 30, 1980, the Court of Appeals without any factual basis arbitrarily reversed the directed verdict in favor of Petitioner who now seeks redress to the Supreme Court of the United States for the reversal of the Fifth Circuit's decision and a reinstatement of the directed verdict in its favor.

JURISDICTION OF THE COURT BELOW

Jurisdiction of this action is grounded upon 43 U. S. C. 1333, the Outer Continental Shelf Lands Act, which extends jurisdiction to accidents occurring on fixed platforms such as the one involved here.

REASON FOR GRANTING CERTIORARI

I.

THE STANDARD BY WHICH DIRECTED VERDICTS ARE GRANTED IS AN IMPORTANT QUESTION OF LAW.

The words written in *Rutherford v. Central Illinois Railroad*, 278 F. 2d 310 (5th Cir.) *cert. denied*, 81 S. Ct. 288. 364 U. S. 922, (1960) are more true today than ever before:

> "A directed verdict is a device to save time and trouble involved in lengthy jury determination. It is something more. It is a method for protecting neutral principals of law from powerful forces outside the scope of law--compassion and prejudice".

There is little doubt that today's society is an extremely litigious one. Many unfounded claims are filed every single day. No one can seriously question the fact that the Courts of the United States face seriously overcrowded dockets.

Cost of litigation are rising astronomically and when a

judicial claim is made against a person, that person, loses much of the use, and therefore the value of his property until that litigation is concluded.

There is little doubt that juries are sometimes swayed, not by the law, but by prejudice, compassion, speculation and conjecture. In fact, the court's power to control jury verdicts has been held to be an inportant safeguard of the Seventh Amendment.

In *Aetna Casualty & Surety Co.*, 122 F. 2d 350 (4th Cir. 1941), speaking of the Seventh Amendment and the Courts power of supervision over jury verdicts, the court said this power was:

> "- - a power to be exercised in pursuance of sound judicial discretion, ***without which the jury system would be capricious and intolerable tyranny,*** which no people could long endure. This court has had occasion more than once recently to say that it was a ***power the courts ought to exercise unflinchingly".***

Mr. Justice Frankfurter, in *Wilkerson v. McCarthy*, 69 S. Ct. 413, 419; 336 U. S. 53, 65; 93 L. Ed. 497, 506 (1949) warned:

> "The easy, but timid way out is for a trial judge to leave all cases tried to a jury for jury determination, but in doing so he fails in his *duty* to take a case from the jury when evidence would not warrant a verdict by it. A timid judge, like a biased judge, is intrinsically a lawless judge".

Clearly, the legal standards by which directed verdicts are granted by trial courts and reviewed by appellate courts is an important legal question before this Honorable Court. Without clear standards, ungrounded claims would further flood the court dockets; every frivilous claim would mean massive litiga-

tion expenses, lengthy trials, and submission to a possibly capricious jury.

II.

THE UNITED STATES COURT OF APPEALS IN REVERSING THE TRIAL COURTS DIRECTED VERDICT IN FAVOR OF PETITIONER SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE IN JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS HONORABLE COURTS POWER OF SUPERVISION.

It is clear in a negligence action that there is a presumption favoring the defendant. To prevail, the plaintiff must shoulder the burden of producing a preponderance of the evidence to establish his claim. ***Mooney v. Stainless, Inc.***, 338 F. 2d 127 (6th Cir.) cert. denied, 85 S. Ct. 1561, 381 U. S. 925, 14 L. Ed. 2d 684 (1965); ***Armstrong v. Commerce Tankers Corp.***, 311 F. Supp. 1236, aff'd 423 F. 2d 957 (2nd Cir.) cert denied, 91 S. Ct. 67, 400 U. S. 833, 27 L. Ed. 2d 65 (1970); ***Petition of Atlass***, 350 F. 2d 592 (7th Cir.) cert. denied, ***Muth v. Atlass***, 86 S. Ct. 551, 382 U. S. 988, 15 L. Ed. 2d 476 (1966); ***Whitney v. Brann***, 394 F. Supp. 1, aff'd 530 F. 2d 966 (3rd Cir.) cert. denied 96 S. Ct. 2628, 426 U. S. 922, 49 L. Ed. 2d 374 (1976) rehearing denied, 97 S. Ct. 194, 429 U. S. 874, 50 L. Ed. 2d 156; ***Hart v. Blakemore,*** 410 F. 2d 218 (5th Cir., 1969).

When the evidence produced is such that no reasonable jury could find that the plaintiff has met his burden, a directed verdict should be granted in favor of the defendant.

In *Gunning v. Cooley*, 50 S. Ct. 231, 281 U. S. 90, 74 L. Ed. 720 (1930) it was said that directed verdicts should be granted when the evidence is "overwhelmingly on one side" and that "any evidence, however slight", on the other side will *not* preclude a directed verdict.

In *Galloway v. United States*, 63 S. Ct. 1077, 319 U. S. 372, 87 L. Ed. 1458 (1943) prohibited "mere speculation" to "supply essential elements" of proof.

In *Brady v. Southern Railway Company*, 64 S. Ct. 38, 320 U. S. 476, 88 L. Ed. 239 (1943) a plaintiff claimed to have been continuously disabled since an accident several years before, but he did not produce evidence with respect to a certain three (3) years period. This Honorable Court held that "mere speculation" was not allowable "to fill vagueness or supply essential elements omitted or withheld," thus a directed verdict should be granted:

> "When the evidence is such that without weighing the creditibility of witnesses there can be but ***one reasonable conclusion*** as to the verdict, the court ***should determine the proceeding*** by non-suit, directed verdict or otherwise in accordance with the applicable practice ***without submission to the jury***, or by such judgment not withstanding the verdict. By such direction, the result is saved from the mischance speculation over legally unfounded claims.
>
> * * *
>
> "bare possibility is not sufficient to submit case to jury"
>
> * * *
>
> "mere speculation of whether that negligence is chargiable to the decedent or another."

The United States Court of Appeals for the Fifth Circuit in the case at hand, violated the well settled legal principals relating to a directed verdict when it reversed the trial court's

grant of a directed verdict in favor of The Rucker Company. THERE IS NO EVIDENCE IN THE RECORDS, WHATSOEVER, THAT THE RUCKER COMPANY WAS NEGLIGENT OR THAT ITS PRODUCT MALFUNCTIONED OR WAS DEFECTIVE IN ANY WAY. The jury in answer to Jury Interrogatory Number Five specifically held that the cause of the accident was the negligence of the driller. The trial judge recognizing that not a single witness testified that the rams had malfunctioned and that there was no evidence whatsoever to implicate the rams, granted a directed verdict in favor of The Rucker Company; and the United States Court of Appeals erred by reversing it on the basis of conjecture.

Compare the case of *Martin K. Eby Construction Company v. Neely*, 344 F. 2d 482, (10th Cir.) affirmed 87 S. Ct. 1072, 382 U. S. 914, 15 L. Ed. 2d 230 (1967). In that case, an employee of *Eby* had fallen to his death from a scaffold built by Eby. Evidence showed that the scaffold's railing did not break and that there was no grease spot on the platform. The Court conceded that:

> ***"The platform might possibly have had something to do with his fall, but there is nothing in the record to show what it was."***

The Court entered a judgment directing a verdict in favor of the defendant opining:

> "No number of mere possibilities will establish a probability".
>
> * * *
>
> "It is a fundamental rule of law that the burden is upon the one asserting negligence to prove it by a preponderance of the evidence and that such burden is not sustained by surmise, speculation or conjecture".

What is so clearly wrong and unjust with the Court of Appeal's decision against Rucker is that the jury, in answer to Jury Interrogatory Number Five, decided why the pipe in the hole became obstructed. It answered that Booker, the driller, was negligent, and that this caused the mast to collapse.

In contrast to this reality, the only factor imaginable against The Rucker Company rests on pure speculation; that is, since The Rucker Company had a piece of equipment on site, this equipment might possibly have malfunctioned. This is clearly a gross departure from the standards enunciated by this Honorable Court and therefore requires an exercise of this Court's supervisory power.

III.

THE DECISION OF THE UNITED STATES COURT OF APPEALS WAS SO ARBITRARY AND CAPRICIOUS AS TO CONSTITUTE A DENIAL OF DUE PROCESS.

In *Canty v. Board of Education, City of New York*, 312 F. Supp. 254, (S. D. N. Y., 1970) the Court said:

> "The terms 'arbitrary' and 'capricious' embrace a concept which emerges from the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution and operates to guarantee that acts of the government will be grounded on established legal principals and have a rational factual basis. A decision is arbitrary, and capricious when it is not supported by evidence or when there is no reasonable justification for the decision".

In *Wood v. Conneaut Lake Park, Inc.*, 386 F. 2d 121 (3rd Cir., 1967). the Court stated:

> "However, if a case between private parties is arbitrarily and capriciously decided, in violation of settled principles of law and contrary to undisputed facts, though the court so deciding has jurisdiction over the suit, the judgment may be in violation of the Fourteenth Amendment".

In its denial of rehearing, part D, the United States Court of Appeals did, finally, attempt to articulate its reasoning for reversing the directed verdict in favor of The Rucker Company. In its reasoning, the Fifth Circuit exhibited unfairness and totally fallacious logic.

The Court mentions five possible theories, brought out at the trial, that might have caused the mast collapse.

a) Defective design or construction of the mast:

b) Operator error, failing to open the rams;

c) Defective rams or accumulator system;

d) Junk-in-the-hole catching on the pipe; and

e) Defective casing in the well hole.

Theory "e" is summarily dismissed, see denial of rehearing, footnote 1, because "no evidence" was presented on this theory.

Theory "d" is dismissed in Part C of the denial of rehearing opinion. The Fifth Circuit said:

> "The only evidence that supports in any way a 'junk' theory is that . . . operations fishing for 'junk' had gone on, . . . that the driller opened the rams. . . .. that the rams worked after the incident, . . . that one

expert claims the indentations on the tool joint do not match those on the rams.

Can such evidence ***negativing the joint hitting-the-rams*** theory raise sufficient inferences that the pipe caught on 'junk' in the hole raise sufficient inferences that make this a jury issue? We think not. . . . did not err in granting summary judgment to Livingston and Gulf States".

Clearly, the Fifth Circuit opined that although there were four separate pieces of evidence against Livingston and Gulf States, relating to, and ***negativing the joint-hitting-the-rams theory, did not*** create a positive inference that there was "junk" in the hole.

Yet, when discussing The Rucker Company, in Part D, evidence relating to ***other defendants*** is "relevant" to Rucker:

> "The evidence for and against the second theory (operator error) is also relevant to the third (defective rams)".

Clearly, this is arbitrary and capricious. The Fifth Circuit reversed the directed verdict in favor of The Rucker Company because evidence as to ***other theories was relevant,*** but it sustained the summary judgment of other defendants (Livingston-Gulf States) ***despite the relevance*** of their evidence to the theory that The Rucker Company might be liable for. Clearly, this cross-relevance of theories is totally fallacious logic.

The arbitrariness and injustice of the Court of Appeals decision against the petitioner is clearly and emphatically shown in the uncontroverted facts:

a) There is not one shred of evidence in this record that The Rucker Company was guilty of any negligence or that the rams were defective.

b) The jury found, in answer to Jury Interrogatory Number Five, that the driller's negligence was the cause of the obstruction of the pipe, completely ruling out any defect in the rams.

CONCLUSION

Why is petitioner herein asking this Court which is overburdened with social, legal and political issues to review this case? The stated and justified basis is that the Court of Appeals violated this Honorable Court's procedural standards, and acted arbitrarily and capriciously enough to constitute a due process violation. But the important reason is that what the Court of Appeals did, considering the facts, the law and equities involved was wrong - an obvious and undisputed wrong. When a decision of the Circuit Court of Appeals is a constitutional violation, only this Honorable Court can remedy the injustice. Nothing is more important to the fabric of American society than procedural due process, without which there can be no guarantee for the redress of *any* wrongs. By righting this one wrong, this court has an opportunity to set precedent, concerning the important question of directed verdicts that is as important as the more publicized political, social and economic issues which face this Honorable Court today.

For the foregoing reasons, petitioner respectfully prays that its Petition for Writs of Certiorari be granted and that after consideration by the Honorable Court that the summary judgment in favor of The Rucker Company be reinstated.

September 28, 1980.

Respectfully submitted,

BY:

JAMES E. DIAZ
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has this day been forwarded to all attorneys of record by depositing the same in the United States Mails, postage prepaid and properly addressed to the said attorneys.

Lafayette, Louisiana, this 28 day of September, 1980.

James E. Diaz

JAMES E. DIAZ
Counsel for Petitioner

APPENDIX 1

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA LAKE CHARLES DIVISION

ERNEST J. RAMOS, et al

VERSUS

LIBERTY MUTUAL INSURANCE CO., et al

CIVIL ACTION NO. 74-449

Filed Aug. 1977

JUDGMENT

After the close of the evidence presented by all other parties, the Court being of the opinion that there is no evidence in the record upon which reasonable men could base the finding of liability as to the Rucker Company or Stewart & Stevenson Services, Inc., a verdict is directed in their favor.

It is ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the defendants, The Rucker Company and Stewart & Stevenson Services, Inc., rejecting all main demands, cross-claims and third-party demands.

JUDGMENT RENDERED at Lake Charles, Louisiana, on the 18th day of July, 1977.

JUDGMENT SIGNED at Alexandria, Louisiana, on this the 5th day of August, 1977.

/s/ Nauman S. Scott
NAUMAN S. SCOTT - Chief Judge

APPENDIX 2

ERNEST J. RAMOS et al., Plaintiffs, Cross-Claimants and Intervenors-Appellants,

v.

LIBERTY MUTUAL INSURANCE COMPANY et al., Defendants,

Shell Oil Company, et al., Defendants-Appellees.

HAROLD LEE ENGINEERING CO. et al., Cross-Claimants and Third Party Plaintiffs-Appellants,

v.

LIVINGSTON CORPORATION et al., Cross-Claimants and Third Party Defendants-Appellees.
No. 78-1549

United States Court of Appeals,
Fifth Circuit.

April 11, 1980.

Rehearing and Rehearing En Banc
Denied June 30, 1980.

Action was brought arising out of collapse of mast of off-shore oil-drilling rig. The United States District Court for the District of Louisiana, Nauman S. Scott, Chief Judge, entered judgment in favor of engineering firm which designed and

manufactured mast, granted directed verdict to owner of mast, and entered summary judgment for bailor of certain equipment, and appeals were taken. The Court of Appelas. Fay, Circuit Judge, held that: (1) trial court erred in excluding evidence of prior, similar collapse of other mast; (2) evidence presented jury question as to whether owner of rig could be held liable under Louisiana statute governing liability of owner

of blowout preventer and rams used on rig could not be held liable.

Affirmed in part, reversed in part, and remanded.

1. Federal Courts key 421

Under Outer Continental Shelf Lands Act, law of Louisiana. the adjacent state, applied in suit arising out of injuries to offshore oil-drilling rig employees. Outer Continental Shelf Lands Act, § 4, 43 U.S. C.A. §1333.

2. Negligence key 125

Evidence of similar accidents might be relevant to defendant's notice, magnitude of danger involved, defendant's ability to correct known defects, lack of safety for intended uses, strength of a product, the standard of care, and causation. Fed. Rules Evid. Rule 401, 28 U.S.C.

3 Negligence key 125

In action arising out of collapse of mast of offshore oil-drilling rig, trial court erred in excluding evidence concerning similar mast which had collapsed approximately two years before, as previous collapse was relevant to manufacturer's notice of defect, its ability to correct defect, mast's safety under foreseeable conditions, strength of the mast, and causation and in view of lack of indication in the record that any

unfair prejudice would accrue to defendants if evidence were admitted. Fed Rules Evid. Rules 401, 403, 28 U.S.C.A..

4 Evidence key 99

Trial court has generally broad discretion in the admission of evidence, but that discretion does not sanction exclusion of competent evidence without sound, practical reason.

5 Evidence key 99

Trial court is usually accorded broad discretion in determining potential prejudice based upon full array of evidence. Red. Rules Evid. Rule 403, 28 U.S.C.A.

6 Witnesses key 404

In action arising out of collapse of mast of offshore oil-drilling rig, in view of testimony of representative of designer and manufacturer of mast to the effect that certain rig had not fallen, trial court should have admitted evidence concerning previous collapse of similar mast to impeach witness.

7. Negligence key 131

Grounds for rule requiring exclusion of evidence of subsequent remedial measures when offered to prove negligence or culpable conduct are that remedial conduct is not an admission and that admission of evidence might discourage steps to improve safety; however, subsequent design modifications can be admissible to prove, for example, feasibility of precautionary measures. Fed. Rules Evid. Rule 407, 28 U.S.C.A.

8. Negligence key 131

In action arising out of collapse of mast of offshore oil-drilling rig, evidence concerning design changes on other mast

was not necessarily inadmissible as subsequent remedial measure, in view of testimony indicating that mast with design changes was not produced after collapse, as design changes, if made significant period of time prior to collapse, were relevant to cause of collapse, defendants, failure to warn despite preaccident knowledge of problem, and feasibility of alternatives. Fed. Rules Evid. Rule 407, 28 U.S.C.A.

9. Negligence key 44

Under Louisiana statute relating to liability of owner of building for damage occasioned by its ruin, offshore oil-drilling platform qualified as a "building" and mast of platform was appurtenant to platform and therefore included within meaning of term "building." LSA - C.C. art. 2322.

10 Negligence key 44

Under Louisiana statute governing liability of owner of building for damage occasioned by its "ruin," offshore oil-drilling rig mast which collapsed was "ruined." LSA - C. C. art. 2322.

See publication Words and Phrases for other judicial constructions and definitions.

11 Negligence key 136(22)

Evidence presented jury question as to offshore oil-drilling rig owner's liability under Louisiana statute governing liability of owner of building for damage occasioned by its ruin, despite owner's contention that third person's actions were sole cause of the damage and despite jury's findings of no defect in mast and of negligence on third party's part, in view of erroneous exclusion of evidence relevant to question of defects which rendered directed verdict judicial error. LSA - C. C. art. 2322.

12. Bailment key 9

Under Louisiana law, bailor of rams and blowout preventer used on offshore oil-drilling rig could not be held liable as bailor, in view of evidence that lessor reasonably inspection and tested bailed equipment approximately one month before collapse of rig's mast.

Francis E. Mire, Lake Charles, La., for Ernest J. Ramos.

J. L. Cox, Jr., Lake Charles, La., for Booker Drilling Co. and Liberty Mutual Ins. Co.

Jones Patin, Harper, Tete & Nolen William M. Nolen, Lake Charles, La., for Harold Lee Engineering Co.

Raggio, Farrar, Cappel & Chozen, Richard B. Cappel, Lake Charles, La., for Gardner-Denver Co.

Woodley & Fenet, Edmund E. Woodley, Lake Charles, La., for Shell Oil Co.

Brame, Bergstedt & Brame, Frank M. Brame, Lake Charles, La., for Oil Field Rental Service Co.

James E. Diaz, Lafayette, La., for The Rucker Co.

Appeals from the United States District Court for the Western District of Louisiana.

Before TUTTLE, FAY and THOMAS A. CLARK, Circuit Judges.

FAY, Circuit Judge:

On this appeal, we review the district court's exclusion of evidence, its ruling that an oil rig is not subject to Louisiana strict tort liability, and its grant of summary judgment to one party. We affirm the grant of summary judgment. As to the other issues, we reverse and remand to the district court.

1. FACTS AND PARTIES' POSITIONS

[1] Ernest J. Ramos and Leon C. Fontenot were injured when the mast of the off-shore oil drilling rig on which they were working collapsed, telescoping within itself. Shell Oil Company (Shell) owned the oil drilling platform, and had contracted with Booker Drilling Company (Booker), the injured parties' employer, for Booker to perform services there. Ramos and Fontenot brought suit to recover for their injuries. 1/ The case mushroomed to include numerous parties. Because virtually each party has a claim against all other parties, we will only attempt to highlight the roles these parties had in the suit. Booker claims its economic loss as a third-party plaintiff, and Liberty Mutual Insurance Company has intervened to recover the Longshoremen and Harbor Workers' benefits it paid Ramos and Fontenot. 2/ The defendants remaining in this action 3/

1/ Jurisdiction is grounded on the Outer Continental Shelf Lands Act, 43 U.S.C.A. § 1333 (West 1979). Under that act, the law of Louisiana, the adjacent state, applies. *Rodrique v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 89 S. Ct. 1835, 23 L. Ed. 2d 360 (1968).

2/ Ramos and Fontenot originally sued Booker and Liberty Mutual, but those actions were dismissed and that decision has not been appealed. *Cf. Longmire v. Sea Drilling Corp.*, 610 F. 2d 1342 (1980) (floorhand on drilling platform entitled to section 905 action against vessel under longshoremen's and Harbor Workers' Compensation Act).

3/ Orders of summary judgment and dismissal were granted to numerous other parties-defendant who will not be enumerated here.

are Shell, the owner of the platform; Harold Lee Engineering Company (Lee), designer and manufacturer of the mast; Gardner-Denver Company, manufacturer of the drilling rig incorporating the Lee mast; Rucker Company, manufacturer of the pipe rams; Stewart & Stevenson Services, Inc., manufacturer of the accumulator which operates the blowout system; and Oil Field Rental Service Company, bailor to Shell of the rams and blowout preventor.

Lee constructs three-piece telescoping oil derricks or masts. Of the many it has sold, one went to Gulf Offshore Company (GO-4) in 1972, and one to Booker (B-30) in 1973. In the spring of 1972, the GO-4 rig collapsed because of a failure in the pins connecting the upper third of the telescoping mast to the top of the middle third. On March 29, 1974, the B-30 collapsed when the pins failed which connected the lower end of the middle third to the top of the bottom third. Persons injured in the GO-4 failure sued and recovered. In this trial over the B-30 collapse, Mr. Harold Lee testified that the same design calculations were used for GO-4 and B-30. When asked if the GO-4 had collapsed, Mr. Lee answered, "No." Appellants were not allowed to admit evidence of the GO-4 collapse, or of the failure to warn Booker of the GO-4 collapse, and the jury was not instructed to disregard Lee's answer, which went unimpeached because of the court's ruling on the collapse of GO-4.

Approximately ten days after the B-30 collapse, another mast, called B-40, was delivered to Booker. The B-40 mast incorporated design features that strengthened the mast in ways that would prevent collapses such as those occurring in the GO-4 and B-30 masts. The trial court excluded evidence of these imporvements.

The trial court granted Shell a directed verdict on the ap-

pellants' actions for strict liability under Louisiana Civil Code Ann. Art. 2322 because Shell did not own the mast. The jury, by special verdict, found that Shell, Gardner-Denver, and Lee were not negligent, that the B–30 rig was not defective, and that Booker was negligent. The jury found that a tool joint had hit the rams causing the mast capacity to be exceeded [4]

4/ The full jury verdict is as follows:

"VERDICT OF THE JURY

We, the jury, hereby return our unanimous findings from a preponderance of the evidence in the case in answer to the interrogatories propounded to us by the Court, as follows, to-wit:

INTERROGATORY NO. 1:

Was Shell Oil Company guilty of any negligence which was a proximate cause of the accident?
Answer "Yes" or "No". ANSWER: No

INTERROGATORY NO. 2:

Was Gardner-Denver Company guilty of any negligence which was a proximate cause of the accident?
Answer "Yes" or "No". ANSWER: No

INTERROGATORY NO. 3:

Was Harold Lee Engineering Company guilty of any negligence which was a proximate cause of the accident?
Answer "Yes" or "No". ANSWER: No

INTERROGATORY NO. 4(A):

Was the mast as manufactured by Harold Lee Engineering and incorporated into the rig sold by Gardner-Denver defective?
Answer "Yes" or "No". ANSWER: No
If the answer to 4(A) is "no", then do not answer 4(B), 4(C), and 4(D).

Ramos, Fontenot, Booker, and Liberty Mutual appeal from the judgment. Shell, Lee, and Gardner-Denver perfected their appeals from the summary judgment for Oil Field Rental for

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4/ Continued

INTERROGATORY NO. 4(B):

Was the mast in normal use at the time of the accident?
Answer "Yes" or "No". ANSWER: _____

INTERROGATORY NO. 4(C)-

If so, was the mast unreasonably dangerous in normal use?
Answer "Yes" or No". ANSWER:_____

INTERROGATORY No. 4(d):

Was the accident proximately caused by the defect?
Answer "Yes" or "No". ANSWER: _____

INTERROGATORY NO. 5:

Was Booker Drilling Company guilty of negligence which was a proximate cause of the accident?
Answer "Yes" or "No". ANSWER: Yes

INTERROGATORY NO. 6:

Do you find that the tool joint struck the rams?
Answer "Yes" or "No". ANSWER: Yes

INTERROGATORY NO. 7:

If your answer to number 7 is "Yes", do you find the blow to the rams caused the represented capacity of the mast to be exceeded?
Answer "Yes" or "No". ANSWER: Yes

Lake Charles, Louisiana, July 20, 1977
Mrs. Warrene Boyd Adams
FOREMAN OF THE JURY"

consideration in the event this court reverses the judgment.[5/]

No one disputes that at the time of the B-30 collapse, Booker was cementing and abandoning an oil well. During this process, the drilling pipes are withdrawn and at times the pipe rams of the blowout preventor system are closed. The pipe rams are doughnut-shaped pieces of metal and rubber that can contract to encircle the drilling pipe at its narrowest diameter, closing off the well. Where one piece of drilling pipe connects with another, the pipe's shape flares, increasing the diameter. If the drilling pipe is pulled up, the flared end will not pass through closed pipe rams.

The bulk of the trial transcript records the testimony of drilling experts. The appellees attempted to prove that when the Booker driller began to reverse out the drilling pipe, he forgot to reopen the rams or began to pull up the pipe at high speed before the rams were fully opened. Acording to appellees, the flared end of the drilling pipe crashed into the closed or partially opened rams, exceeding the mast's wieght capacity and causing the collapse. Appellees' experts testified that although the rated capacity of the B-30 was 234,600 pounds, the shock load of the collision was about 700,000 pounds. The gist of appellees' argument is that operator error was the sole cause of the collapse.

Experts for appellants painted another picture of the occurrence. Appellants' experts testified that the indentation on the pipe ram did not match up with the drilling pipe. Alternative theories for the shock were that a hole in the outer casing caused the drilling pipe to snag, or that "junk" was left in the

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5/ Ramos, Fontenot, Booker, and Liberty Mutual will be referred to as "appellants" in this opinion. Shell, Lee, Gardner-Denver and the other defendants, cross-claimants,, and third-party defendants will be called "appellees," even though some of them are also third-party plaintiff appellants.

drilling hole by one of the defendants. According to appellants' experts, even if the tool joint hit the rams, calculations made from the indentations with all factors taken at their worst possible values indicated that the load was below the rated maximum, at between 198,000 and 220,000 pounds. Appellants' theory on the main cause of the collapse was defective design of the mast. Appellants' experts testified that the front legs of the mast were not designed to carry a sufficient load. The front legs crumpled, pulling out the front pins of the middle section and putting all the weight on the back legs, which caused the load to rest on the remaining two back pins. These pins and the saddles then ripped out of the back legs, collapsing the rig. Experts testified that small metal plates near the pins, better securing of the pins, and slight reinforcement to the front legs might have prevented the collapse. Experts also testified that under the American Petroleum Institute guidlines, all mast designs should include a safety factor. If a safety factor has been included, the mast would have held approximately 437,000 pounds. The core of appellants' argument is that operator error did not occur, but even if it did, a correctly designed mast would not have collapsed. Defects in design were the cause of the injuries.

II. EVIDENCE OF SIMILAR ACCIDENT

Appellants claim the trial court erred in excluding evidence of the prior, similar collapse of a Lee mast. Although the trial court's ruling is not in the record, it apparently believed that evidence of the prior collapse was irrelevant, or that it would have been prejudicial.

[2,3] Appellants contend that the prior GO-4 collapse is relevant.

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence.

Fed. R. Evid. 401. Evidence of similar accidents might be relevant to the defendant's notice, magnitude of the danger involved, the defendant's ability to correct a known defect, the lack of safety for intended uses, strength of a product, the standard of care, and causation. ***See Dollar v. Long Mfg., N. C., Inc.***, 561 F. 2d 613, 617 (5th Cir. 1977), ***cert denied***, 435 U.S. 996, 98 S. Ct. 1648, 56 ' Ed. 2d 85 (1978); ***Nelson v. Brunswick Corp.***, 503 F. 2d 376, 380 (9th Cir. 1974); ***Wojciechowski v. Long-Airdox*** 488 F. 2d 1111, 1116 (3rd Cir. 1973); ***Julander v. Ford Motor Co.***, 488 F. 2d 839, 846 (10th Cir. 1973); ***Bailey v. Kawasaki-Kisen, K. K.***, 455 F. 2d 392 (5th Cir. 1972); ***Greyhound Lines, Inc. v. Miller***, 402 F. 2d 134 (8th Cir. 1968); ***Jones & Laughlin Steel Corp. v. Matherne***, 348 F. 2d 394, 400 (5th Cir. 1965). In the context of this case's factual disputes, obviously the GO-4 collapse could be relevant to Lee's notice of the defect, its ability to correct the defect, the mast's safety under forseeable conditions, the strength of the mast, and, most especially, causation.

Because of the impact similar failures can have, the courts have developed principles governing their admissibility:

Whether a reasonable inference may be drawn as to the harmful tendency or capacity [of a product] from prior failures depends upon whether the conditions operating to produce the prior failures were substantially similar to the occurrence in question. The requirement that the prior accident not have occurred at too remote a time is a special qualification of the rule requiring similarity of conditions. The admission of such evidence is also subject to the reasonable discretion of the trial court as to whether the defendant is taken by unfair surprise and as to whether the prejudice or confusion of issues which may probably result from such admission is disproportionate to the value of such evidence.

Jones & Laughlin Steel Corp. v. Matherne, 348 F. 2d at 400 (footnotes omitted). *See Roundtree v. Seaboard Coast Line R. Co.*, 418 F: Supp. 220, 223 (M.D. Fla. 1976). Appellants argue that the GO-4 and B-30 failures were similar and were not remote in time. They also claim that no unfair prejudice or confusion results from the admission.

The evidence does indicate similarity between the masts and their failures. Appellants' expert Mr. Green had inspected both the GO-4 and B-30. 6/ Mr. Green had testified in the trial concerning the GO-4, in which those plaintiffs recovered. During appellants' offer of proof. Mr. Green testified in this matter that the masts and the failures leading to the collapses were virtually identical. In both, the derrick sprang out, causing the back pins to break. In both, according to Mr. Green, the mast was lifting less than its rated capacity. The differences between the GO-4 and its failure, and the B-30 mast and its collapse were insubstantial. The GO-4 mast had a rated capacity of 340,000 pounds, but failed at about 160,000. B-30 was rated at 234,600 and failed at 198,000 pounds. The GO-4 failure occurred at the connection between the top and middle sections; the B-30 between the middle and bottom sections. The GO-4 seats or saddles did not fail; the GO-4 broke at the pins and the housing on the pin connection to the supporting members. In B-30, both the pins and seats or saddles failed. Transcript at 538-44. Green also testified that Go-4 failed after about one month of operation. GO-4 was delieverd in March, 1972, approximately two years before the B-30 collapse. *Id.* at 1137. Green related that before the B-30 collapse, GO-4 had been modified with a truss around the back, and is now

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6/ Mr. Green had been called in to inspect four failures involving Lee masts, three of which were collapses in which the mast retelescoped within itself.

in operation.

Although this should have been enough to establish the similarity between the masts and failures, other testimony from Mr. Lee of Harold Lee Engineering highlighted the similarity of the two masts. Transcript at 20-27. He stated that nothing in B-30 was new; some of the calculations for GO-4 were used in the manufacture of B-30. *Id.* at 1124-63. Lee testified that both GO-4 and B-30 had the same type legs and leg stress calculations. The basic difference is that GO-4 was installed vertically with a crane, while B-30 was scoped out horizontally and then lifted. Lee admitted there was very little difference between the two designs. When the plaintiffs requested production of the diagrams and documents for the B-30, at least two of the documents delivered by appellees were designs and calculations for GO-4. Record at 931-32.

[4] We hold that the evidence of the GO-4 failure was relevant and that the mast and collapse were sufficiently similar to be admitted. In addition, the GO-4 failure was not too remote in time from the B-30 collapse. The trial court generally has broad discretion in the admission of evidence, but that discretion does not sanction exclusion of competent evidence without a sound, practical reason. ***Bailey v. Kawasaki-Kisen, K. K.***, 455 F. 2d 392, 398 (5th Cir. 1972).

[5] The probative value of the GO-4 evidence also was not outweighed by the possibility of unfair prejudice to appellees. The federal rule reads as follows:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403. This was not an occasion, however, for the

application of rule 403. Of course, "unfair prejudice" as used in Rule 403 is not to be equated with testimony simply adverse to the opposing party. Virtually all evidence is prejudicial or it isn't material. The prejudice must be "unfair."

Dollar v. Long Mfg., N.C., Inc., 561 F. 2d at 618. Any prejudice accuring from admission of the GO-4 evidence would not be unfair. Again, the trial court is usually accorded broad discretion in determing potential prejudice based upon the full array of evidence. *Minnesota Farm Bureau Marketing Corp. v. North Dakota Agricultural Marketing Ass'n, Inc.*, 563 F. 2d 906, 911 (8th Cir. 1977); *Moran v. H. W. S. Lumber Co., Inc.*, 538 F. 2d 238, 243 (9th Cir. 1976); *Wallace v. Ener*, 521 F. 2d 215, 222 (5th Cir. 1975); *Construction, Ltd. v. Brooks-Skinner Building Co.*, 488 F. 2d 427 (3rd Cir. 1973). Yet here the record does not disclose that any unfair prejudice would accrue to appellees if the evidence were admitted.

[6] Another basis exists for admitting evidence of the GO-4 collapse: impeachment of Mr. Lee. On cross-examination Harold Lee testified as follows:

Q.[by Mr. Mire, plaintiffs' counsel] Well, actually, Mr. Lee. I see this [exhibit] is marked GO Number 4. Isn't that for the Gulf Offshore Number 4 Rig that you built prior to this?

A.[by Mr. Lee] Very possibly so.

Q.And that rig actually fell, did it not, this Gulf Offshore Number 4?

A.No –

[Followed by objection and in-chambers, off-record discussion by court and counsel].

Transcript at 24-25. Further evidence on the collapse was

excluded. No charge was given to the jury to soften the blow of the witness's false statement. 7/We agree with appellants that the evidence should have been admitted to impeach Mr. Lee. *Cf. Dollar b. Long Mfg., N.C., Inc.*, 561 F. 2d at 618 (under rule 407, evidence of repairs admissible for impeachment).

III. EXCLUSION OF B-40 CHARGES

[7] The trial court also excluded evidence of the B-40 mast's new design 8/Mr. Booker would have testified that the

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7/ The transcript provided on appeal is not the best. Not only are witnesses' testimonies reproduced incompletely and out of order, but the transcript also omits opening arguments, legal discussions, closing arguments, and the jury charges. It is therefore often unclear why the trial judge made many rulings or whether the trial court instructed the jury on a particular point. Evidently both parties agree, however, that the jury was not instructed to disregard the question and answer, and that the evidence was excluded as a dissimilar accident after the offer of proof by witness Green.

8/ On the admission of the B-40 evidence, the court stated the following:

THE COURT: All right. In justification the Court's interpretation of this matter, the Court feel that the day of the accident is a matter that is particularly the matter in point; that if in fact an improvement was made in the manufacturer [manufacture?] of one Rig 30 to the manufacturer - to the manufacturer and delivery of Rig 40. And the Court, regardless of when the accident happened, would rule the same way. In other words, I feel that the date of the accident is not important. The product is what I am comparing.

Transcript at 549-50. While the ruling is not entirely clear, it was in response to the following objection, which is clearly grounded on rule 407:

MR. NOLEN: Yes, sir. I objected to that line of questioning on the grounds that it was an attempt to show a post accident change in a similar product for the purpose of showing a defect in this product, which we felt was improper. *Id.* at 549.

B-40 mast had extra plates and more welding than the B-30. Transcript at 5[illegible]-54. The Federal Rules of Evidence require exclusion of evidence of subsequent remedial measures when offered to prove negligence or culpable conduct:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Fed. R. Evid. 407. The grounds for the rule are that remedial conduct is not an admission,[9] and that admission of the evidence might discourage steps to improve safety. Advisory Committee's Note, 46 F.R.D. 161, 236-37 (1969); ***Bailey v. Kawasaki-Kisen, K. K.***, 455 F. 2d 392 (5th Cir. 1972). Subsequent design modifications can be admissible to prove, for example, the feasibility of precautionary measures. ***E. g.***, ***Boeing Airplane Co. v. Brown***, 291 F. 2d 310 (9th Cir. 1961). ***See*** Advisory Committee's Note, 46 F.R.D. at 237.

[8] But we need not wrestle with the rule's exceptions because it appears the B-40 changes do not come within rule 407's proscription. The B-40 was delivered approximately ten days after the B-30 collapse. Given Lee's extensive testimony on the time required to manufacture a mast, the B-40 mast apparently was not produced "after [the B - 30]

9/ [T]he rule rejects the notion that "because the world gets wiser as it gets older, therefore it was foolish before." *Hart v. Lancashire & Yorkshire Ry. Co.*, 21 L. T. R. N.S. 261, 263 (1869).

Advisory Committee's Note, 46 F. R. D. 161, 236 (1969).

events." 10/ If these are the facts, the B-40 changes should not have been excluded as subsequent remedial measures.

If the B-40 design changes were made a significant period of time prior to the collapse of B-30, they were certainly relevant to the cause of the collapse, appellees' failure to warn despite preaccident knowledge ot the problem, and the feasibility of alternatives. On retrial, the district court should develop fully the time interval involved as well as all other pertinent factors and articulate those reasons allowing or precluding such evidence under theFederal Rules of Evidence.

IV. SHELL'S STRICT LIABILITY

Although the grounds for the ruling are not in the record, the district court granted Shell's motion for a directed verdict on the strict liability action under Louisiana Civil Code Art. 2322, apparently because Shell was not the "owner" of the mast. That code section states:

> The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it or when it is the result of a vice in its original construction.

La. Civil Code Ann. Art. 2322 (West 1979). At the time of the ruling the Louisiana courts had not ruled on the applicability of Art. 2322 to a situation like this one. Unfortunately, the trial court erred in guessing which way the Louisiana court would rule. In *Olsen v. Shell Oil Company*, 365 So.2d 1285 (1978), the Supreme Court of Louisiana answered certified questions from this court on facts similar to *Ramos*.

10/ Neither party discusses whether the B-40 changes should be excluded as subsequent to the GO-4 collapse.

The court, in an opinion by Justice Tate, first held that a drilling platform is a "building" within the meaning of Art. 2322. *Id.* at 1289-90. The court reaffirmed that appurtenances to structures can be included within the meaning of the term "building." *Id.* at 1291. The court then held that while an owner could contract with an occupant to regulate relative "ownership" of incorporated appurtenances and to provide for indemnification, an owner cannot limit by contract his nondelegable duties to third persons injured by defects in the building. *Id.* at 1291-92. The court held that the explosion in *Olsen* was a "ruin" *Id.* at 1292-93. The court noted that if the fault in the building were caused by some third person, the person injured, or some irresistible or unforeseeable force, the owner might not be liable. *Id.* at 1289. The court rejected however, the argument that actions by the tenant-independent contractor in *Olsen* absolved the owner of its nondelegable duties. *Id.* at 1293. Only when the third person's actions are the sole cause of the damage, in the nature of a superseding cause, will the owner be exonerated. When the "third person" is a stranger, not one acting with the owner's consent, the owner cannot avoid 2322 liability. *Id.* at 1293-94.

[9-11] As in *Olsen*, Shell owns a drilling platform which qualifies as a "building" under 2322, and the mast is appurtenant to the platform. *See McIlwain v. Placid Oil Co.*, 472 F. 2d 248, 250 (5th Cir.), *cert denied*, 412 U.S. 923, 93 S. Ct. 2734, 37 L. Ed. 2d 150 (1973). The derrick collapsed, and was therefore "ruined" within the statute's meaning. *See Moczygemba v. Danos & Curole Marine Contractors*, 561 F. 2d 1149, 1152 n. 6 (5th Cir. 1977). Appellants claim the derrick had defects in its repair and original construction. 11/ Shell argues,

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11/ We note that *Olsen*, unlike *Ramos*, definitely dealt with a defect in repair, not construction. Neither party cites to precedent distinguishing repair and construction although logically one might expect that construction defects might be more likely to entail superseding causes

however, that in this case, unlike ***Olsen***, a third person's actions were the sole cause of the damage. Even if we were to accept Shell's position, we do not believe that all the evidence pointed so strongly and overwhelmingly in Shell's favor that the court should have removed the question from the jury. ***Boeing Company v. Shipman***, 411 F. 2d 365, 374-77 (5th Cir. 1969) (en banc). Shell points to the jury's findings of no defect in the mast and of negligence on Booker's part as rendering the court's error harmless. ***See Moczygemba v. Danos & Curole Marine Contractors***, 561 F. 2d at 1152. As discussed earlier, however, the trial court erred in excluding certain evidence relevant to the question of defects. Because this evidence touches on the cause of the collapse, the error in directing the verdict is not harmless. ***See Bailey v. Kawasaki-Kisen, K.K.***, 455 F. 2d 392 (5th Cir. 1972).

V. BAILOR'S LIABILITY

[12] Lee,[12/] Gardner-Denver, and Shell appeal the granting of summary judgment to Oil Field Rental Service Company (OFR), which had leased the blowout preventor, rams, and accessory equipment to Shell. OFR inspected and tested the bailed equipment approximately one month before the collapse. The district court held that there was no evidence

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11/ Continued

Wholly unrelated to duties of the owner.

12/ **Despite its present appeal, Lee did not oppose the motion for summary judgment at the time it was made. Record at 3708. Gardner-Denver argued that despite OFR's affidavits, whether the inspection satisfied the bailor's burden is a question of fact. *Id.* at 3971-72.**

that OFR's inspections were performed in a manner which would not disclose present defects, and therefore OFR was not liable under Louisiana law. *Lyons v. Jahncke Service, Inc.*, 125 So. 2d 619 (La. App. 1960).

Louisiana law is settled on a bailor's liability: a bailor for value received who delivers such a vehicle or machine to his bailee possessed of a defect of which he was aware or could have detected by ordinary examination, without warning bailee thereof, is liable in damages to bailee or any third party injured thereby, provided such injury is the reasonably foreseeable result of such failure.

Lyons v. Jahncke, 125 So. 2d 619, 631 (La. App. 1960). *See also Blandino v. Brown Erection Co., Inc.*, 341 So. 2d 577 (La. App. 1977); *Jenkins v. Dixie Rental Tools and Casing Crews, Inc.*, 283 So. 2d 271 (La. App. 1973), *cert. denied*, 285 So. 2d 542 (La. 1973); *Dore v. Hartford Accident & Indemnity Co.*, 180 So. 2d 434 (La. App. 1965); *White v. Huspeth*, 147 So. 2d 874, 879 (La. App. 1962), *cert. denied*, 243 La. 1018, 149 So. 2d 768 (1963).

Our review of the evidence must be in the light most favorable to Lee, Gardner-Denver, and Shell. *United States v. Diebold, Inc.*, 369 U.S. 654, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962); *Marshall v. Victoria Transportation Co.*, 603 F. 2d 1122, 1123 (5th Cir. 1979). When viewed in this fashion, the evidence discloses that OFR satisfied its duty by making a reasonable inspection. The award of summary judgment to OFR was proper.

VI. CONCLUSION

After a long and hotly fought trial, an appellate court is reluctant to overturn the rulings of a district judge. Nevertheless, relevant evidence which engenders no unfair prejudice and

which relates to the core of the dispute should not be summarily excluded. In addition, the recent clarification of Art. 2322's applicability requires reversal of the directed verdict for Shell. The district court's grant of summary judgment to Oil Field Rental is AFFIRMED; the directed verdict and other final judgments are REVERSED; and the matter is remanded for retrial.

WEST KEY NUMBER SYSTEM

APPENDIX 3

**ERNEST J. RAMOS et al., Plaintiffs,
Cross-Claimants and Intervenors - Appellants,**

v.

**LIBERTY MUTUAL INSURANCE COMPANY et al.,
Defendants,**

**SHELL OIL COMPANY et al.,
Defendants-Appellees**

**HAROLD LEE ENGINEERING CO. et al.,
Cross-Claimants and Third Party Plaintiffs-Appellants,**

v.

**LIVINGSTON CORPORATION et al.,
Cross-Claimants and Third Party
Defendants-Appellees.**

No. 78-1549

United States Court of Appeals, Fifth Circuit.

June 30, 1980

Action was brought arising out of collapse of mast of off-shore oil-drilling rig. The United States District Court for the District of Louisiana, Nauman S. Scott, Chief Judge, entered Judgment in favor of engineering firm which designed and manufactured mast, granted directed verdict to owner of rig, and entered summary judgment for bailor of certain equipment, and appeals were taken. In opinion clarifying its previous decision which affirmed in part, reversed in part, and remanded the action, 615 F. 2d 334, and on petitions for rehearing filed by manufacturers of components of the rig, the Court of

Appeals held that: (1) remand was required of issue of duty of rig's owner to indemnify designers and manufacturers of the rig and mast under Louisiana statute relating to liability of owner of building for damage occasioned by its ruin; (2) District Court did not err in granting summary judgment to defendant which allegedly left "junk in the hole" which, under one theory, allegedly caused the mast to collapse; (3) judgments rendered in favor of various parties on contribution or indemnity claims were required to be reversed since the jury verdict against plaintiffs was reversed; and (4) there was conflicting substantial evidence sufficient to create jury issue on liability for contribution or indemnity of manufacturers of components of the rig to owner of the rig and designers and manufacturers of the rig and its mast.

Petitions for rehearing denied; Judgment of District Court affirmed in part and reversed in part; cause remanded.

1. Federal Court key 939

Remand to district court of action arising out of collapse of mast of offshore oil-drilling rig was required on issue of duty of rig's owner to indemnify designers and manufacturers of the mast and the rig under Louisiana statute governing liability of owner of building for damage occasioned by its ruin. LSA-C.C. art 2322.

2. Negligence key 136(22)

In action arising out of collapse of mast of offshore oil-drilling rig, evidence was insufficient to present to jury theory that reason for collapse of the mast was shock force to the rig caused by presence of "junk in the hole" left there by one of the defendants.

3. Federal Courts key 933

Judgments on contribution or indemnity claims rendered in favor of various parties, in action arising out of collapse of mast of offshore oil-drilling rig, on basis that such third-party claims were rendered moot by jury verdict against plaintiffs were required to be reversed since the jury verdict was reversed on appeal.

4. Contribution key 9(7)
Indemnity key 15(9)

In action arising out of collapse of mast of offshore oil-drilling rig, sufficient conflict existed in substantial evidence to raise jury issue on liability for contribution or idemnity of manufacturers of components of the rig to owner of the rig and designers and manufacturers of the rig and mast.

Appeals from the United States District Court for the Western District of Louisiana.

ON PETITION FOR REHEARING
AND PETITION FOR REHEARING EN BANC

(Opinion April 11, 1980, 615 F. 2d 334 (5th Cir. 1980)

Before TUTTLE, FAY and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

This action concerns the claims and cross-claims of multitudinous parties over the collapse of a mast on an offshore oil rig. On appeal, this court affirmed the grant of summary judgment to Oil Field Rental Service Company, and reversed and remanded the other final judgments. 615 F. 2d 334 (5th

Cir. 1980). Rucker Company and Stewart & Stevenson Services, Inc. petition for rehearing of the reversal of directed verdicts in their favor. Harold Lee Engineering Company and Gardner-Denver Company request that their cross-claims against Shell be decided favorably for them without remand, and that this court reconsider its reversal of the trial court's evidentiary rulings. Livingston Corporation, formerly Gulf-States Fishing & Rental Tools, Inc, moves for clarification of whether the summary judgment in its favor has been reversed. Other parties who did not petition for rehearing have cross-appeals and judgments affected by the decision. We now clarify our previous decision to specify which judgments have been reversed.

A. *Lee and Gardner-Denver*

[1] Lee and Gardner-Danver urge that Shell's liability to indemnify them should be decided by this court without remand. Because the district court has not ruled on the duty of any owner to indemnify parties under Louisiana Civil Code Art. 2322, we remand that issue to the district court for determination during the retrial of this case.

Requests by Lee and Gardner-Denver for rehearing on the reversal of the trial court's evidentiary rulings are denied.

B. *Livingston Corporation*

[2] Lee, Gardner-Denver, and Shell appealed the grant of summary judgment to Livingston Corporation, formerly Gulf States Fishing & Rental Tools, Inc., although none of the parties discussed Livingston's liability in their briefs, at oral argument, or in petitions for rehearing. One theory advanced for why the mast collapsed was that a shock force to the rig was caused by the presence of "junk in the hole," left there by Gulf States after its "down hole" operations. The district court found that

> after exhaustive discovery, there is no evidence of

> "junk." In fact, the only viable evidence disclosed . . . establishes that there was no "junk" in the hole.

Record, vol. 14, at 4076-77. Experts which Lee and Gardner-Denver themselves supplied stated that the "junk" theory was "very unlikely," was "not a viable possibility," and was excluded by the joint-hitting-the-rams theory. Record, vols. 12 & 13, at 3526, 3551, 3559-63, 3628-29, & 3631-33. The pipe being moved at the time of the accident was at the 370 to 450-foot level. Earlier that day, Booker employees had used a cementing squeeze tool to the 890-foot level without meeting resistance, which indicates that no "junk" was in the hole. Record, vols. 11 & 12, at 3456, 3559-63. The only evidence that supports in any way a "junk" theory is that operations fishing for "junk" had gone on, that the driller claims to have opened the rams, that the rams worked after the incident, and that one expert claims the indentations on the tool do not match those on the rams. Can such evidence negativing the joint-hitting-the-rams theory raise sufficient inferences that the pipe caught on "junk" in the hole to make this a jury issue? We think not. The undisputed positive fact that the drilling hole was clear to a level of at least 890 feet eliminates any doubt about the presence of "junk" at a higher level. The district court did not err in granting summary judgment to Livingston and Gulf States.

C. *Contribution and Indemnity Claims*

[3] Although not all of the cross-appellees petitioned for rehearing, to remove further doubt about the scope of this court's earlier decision, the judgments on the contribution or indemnity claims in favor of Gardner-Denver, Lee, Shell Oil, Booker Drilling Company, and Pittsburgh Testing Lab are reversed. The district court granted these verdicts because the jury verdict against the plaintiffs rendered the third-party claims

moot. Record, vol. 14, 4220-21. Since the jury verdict is reversed, these claims are again viable.

D. *Rucker and Stewart & Stevenson*

[4] After presentation of the evidence, the trial court granted directed verdicts to Rucker, the pipe rams manufacturer, and Stewart & Stevenson, the accumulator system manufacturer. Docket Entry for July 18, 1977. Shell, Lee, and Gardner-Denver cross-appealed these verdicts to protect themselves in the event of reversal of the jury verdict. The plaintiffs dismissed their appeals of the verdicts for Rucker and Stewart & Stevenson. Therefore, the only question before this court is whether there was a conflict in substantial evidence sufficient to create a jury issue on the liability for contribution or indemnity of Rucker and Stewart & Stevenson to Shell, Lee, and Gardner-Denver.

This question distills to an inquiry into evidence presented on the cause of the drilling mast's collapse. Once the "junk"-in-the-hole theory is eliminated, three hypotheses on the cause remain.1/

The first is that design or construction defects are the main cause of the mast's collapse. Supporting this theory was testimony by plaintiffs' experts that the design load was below the mast's capacity. On retrial, evidence of failure of GO-4, a mast

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1/ At one point, some experts proffered a fourth hypothesis, that the pipe caught on a hole in the casing, but no evidence was presented on this theory.

Although the theories are listed separately, the amount of the shock load interconnects the design theory and the pipe ram theories. If the load exceeded the mast's capacity, it may be irrelevant whether Lee designed a faulty mast. If the load was less than capacity, the question is whether the incident was proximately caused by a design defect, some negligence connected with the rams, or both.

of similar design, will also be used to support this theory. Experts for Lee and Gardner-Denver contradicted testimony on design and construction defects and stated that the shock load was above the mast's capacity.

The second theory is that operator error caused the collapse. Under this theory either the driller did not pull the switch to open the rams, he did not allow enough time for the rams to open before pulling up the pipe, he moved the switch into the neutral - not- open - position, or someone at the remote control station closed the rams after the driller had opened them. Because of one of these errors, the tool joint hit the closed or partially opened rams, causing the shock load which led to the mast's collapse. The indentations on the pipe rams and the defendants' experts' testimony that the angle of indentation on the tool joint matches that on the rams support this theory. Opposing this theory was evidence of one expert that the markings and indentations of the joint and rams did not match, evidence that the rubber portion of the rams was not scarred as would be expected if this occurred, and the driller's testimony that he opened the rams, started up the pipe a sufficient time later, and observed that the rams were open about one-half hour after the accident.

The third theory is that the driller did throw the switch, but that some defect in the rams or accumulator caused the rams not to open or to open too slowly. Under this theory, Rucker or Stewart & Stevenson caused the collapse. The evidence for and against the second theory is also relevant to the third. In addition, a government inspector may have found a defect in the blowout preventor earlier during the day of the accident, but the system was reportedly brought to government standards. Rucker and Stewart & Stevenson contend that testing which showed that the rams worked perfectly both before and after the incident negatives this theory.

As should be apparent, the proof on causation is replete with

the conflicting testimony of experts and the haunting possibilities raised by circumstantial evidence. For our purposes, the question is the extent to which these conflicts and circumstances are substantial enough to create a jury issue precluding a directed verdict.

Rucker and Stewart & Stevenson argue that the perfect performance of the rams both before and after the collapse leads to the inference that no defect was present. Furthermore, they claim that because the cross-claimants proved no specific defect in the rams or accumulator, the directed verdict was proper. The cross-claimants argue that no specific defect need be shown. They assert that it is the jury's province to decide whether operator error or mechanical defect caused the shock load.

Viewing all reasonable inferences in the light most favorable to the cross-appellants we hold that more than "a mere scintilla of evidence" has been presented against Rucker and Stewart & Stevenson and that a sufficient conflict exists in the substantial evidence to raise a jury question. *See, Boeing Company v. Shipman*, 411 F. 2d 365, 374-75 (5th Cir. 1969) (en banc). The directed verdicts for Rucker and Stewart & Stevenson are reversed.

E. *Conclusion*

The petitions for rehearing by Lee and Gardner-Denver are DENIED. The district court's grants of summary judgment to Oil Field Rental Service and Livingston Corporation - Gulf States Fishing & Rental Tools, Inc. are AFFIRMED. The other verdicts and judgments are REVERSED and the matter is remanded for retrial in accordance with this court's earlier opinion.

No member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on

rehearing en banc. (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.